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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a $5 million punitive damage award, which was imposed vicariously against petitioner for alleged fraud by its agent in connection with the sale of an insurance policy to punish and deter petitioner for conduct in Alabama and twelve other states and which is nearly 1,600 times respondent's economic damages, more than 20 times respondent's "mental anguish" damages, and 5000 times comparable statutory penalties, is a "grossly excessive" punishment that violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause prohibits the State of Alabama from using punitive damages either to punish Life of Georgia for transactions that occurred in other States or to deter Life of Georgia from engaging in transactions in other States in the future.

3. Whether the $5 million punitive damage award is duplicative, and therefore violates the Due Process Clause, because it is partially predicated on conduct that was previously punished by the $1 million punitive damage award affirmed in *Foster v. Life Insurance Company of Georgia*, 656 So. 2d 333 (Ala. 1994).

4. Whether the Alabama punitive damage system violates the Due Process Clause because it fails to provide fair notice of the conduct that will subject a person to punishment or of the severity of the penalty that the State may impose.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties in the court below are listed in the caption to this petition. Life Insurance Company of Georgia is wholly owned by ING America Life Corporation, which in turn is wholly owned by ING America Insurance Holdings, Inc. The latter is a holding company of insurance companies and is wholly owned by Internationale Nederlanden Groep N.V., a Netherlands corporation publicly traded on European stock markets.

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PETITION FOR WRIT OF CERTIORARI

Life Insurance Company of Georgia ("Life of Georgia") petitions this Court for a writ of certiorari to review the judgment in this case of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion on applications for rehearing of the Supreme Court of Alabama, released April 26, 1996, is reprinted at Appendix ("App.") 1a-77a, and has not yet been reported. The original opinion of the Supreme Court of Alabama is reprinted at App. 78a-146a, and is unreported. The Order of the trial court denying Life of Georgia's Motion For New Trial Or, In The Alternative, For JNOV Or, In The Alternative, For Remittitur, filed on October 19, 1994, is reprinted at App. 147a-154a, and is unreported.

JURISDICTION

The Supreme Court of Alabama released its initial opinion and judgment in this case on November 17, 1995. Both Life of Georgia and respondent filed timely applications for rehearing. On April 26, 1996, the Supreme Court of Alabama granted the applications for rehearing, withdrew the earlier opinion and substituted a new opinion and judgment. This petition has been filed within 90 days of the release of the opinion and judgment on applications for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

Like a number of insurance companies, Life of Georgia offered customers who are eligible for the federal Medicare program a "Medicare Supplement" policy. Such a policy was designed to provide insurance to Medicare recipients for medical expenses that are not covered by Medicare. The policy provided important protection for tens of thousands older Americans who otherwise would have had to pay uncovered expenses out of their own pockets. A Medicare Supplement policy was not necessary, however, for individuals who were eligible for Medicaid as well as Medicare -- so-called "dual eligibles" -- because Medicaid provides those individuals with benefits similar (although not identical) to those of the Medicare Supplement policy.

Life of Georgia had an explicit company rule against selling Medicare Supplement policies to dual eligibles. *E.g.*, Tr. 285. Consequently, the standard application for Medicare Supplement insurance specifically asked whether the applicant was eligible for Medicaid. *See* Tr. 451. Life of Georgia agents were trained that they could not sell the Medicare Supplement policy to any individual who answered "yes" to that question. *E.g.*, Tr. 441. The company's policy specified that if a Medicare Supplement policy were sold to a dual eligible, any premiums paid would be returned. Moreover, the agent who sold the policy would lose any commissions received from the sale. *E.g.*, Tr. 105; 333; 348; 378.

In 1990, Life of Georgia agent Barbara Holt sold respondent Daisey L. Johnson a Life of Georgia Medicare Supplement policy that respondent did not need due to her eligibility for Medicaid. Although respondent apparently was eligible for Medicaid benefits at the time she bought the policy, Tr. 39, the application submitted to Life of Georgia stated that she was not eligible for Medicaid assistance, *see* Tr. 451.

B. Proceeding In The Courts Below

In 1993, respondent sued Life of Georgia, seeking compensatory and punitive damages and claiming that the company committed the torts of fraud and fraudulent suppression in connection with Ms. Holt's sale of the Medicare Supplement policy to respondent. In its answer, Life of Georgia denied respondent's allegations and objected that the imposition of punitive damages would violate the Due Process Clause of the Fourteenth Amendment. *See* App. at 155a-157a.

At trial, respondent's lawyers focused the jury's attention largely on Life of Georgia's purported conduct -- or potential future conduct -- with respect to dual-eligible individuals who resided in twelve other States, and asked the jury to punish

Life of Georgia on that basis. Over Life of Georgia's objection, respondent introduced evidence purporting to show that Life of Georgia had sold unneeded Medicare Supplement policies to three other individuals. Two of these individuals resided in Florida. Tr. 43; 52. The only other Alabama resident who testified that she had purchased such a policy -- Ms. Mattie Foster -- had been represented by respondent's lawyers in an earlier action against Life of Georgia in which a jury imposed a $1 million punitive damage award against the company. *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (Ala. 1994). *See* Tr. 60-62. The finding of liability and imposition of punitive damages in *Foster* came well *after* the conduct at issue here had occurred.

In closing argument, respondent's counsel urged that the jury punish Life of Georgia by giving respondent "a hundred dollars for each" dual-eligible person in Alabama *and in the other twelve States* in which Life of Georgia sold Medicare Supplement policies, regardless whether Life of Georgia ever had actually sold or even attempted to sell an insurance policy to any of those individuals.[1] Thus, respondent asked the jury

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[1] Respondent's counsel asserted that there were 116,025 people in Alabama alone "that are possible purchasers of this Medicare supplement policy that don't need it," and argued:

> We're going to ask you for the hundred and sixteen thousand twenty-five people, we're going to ask you to remind them of those people, and give a hundred dollars for each one of them. Ladies and gentlemen, that makes one million one hundred and sixty thousand two hundred and fifty [sic].
>
> Now, they do business in thirteen states, ladies and gentlemen. . . . We're going to ask you, ladies and gentlemen, to return a verdict for all thirteen states which comes to fifteen million eighty-three thousand two hundred and fifty.

to punish Life of Georgia based on the mere possibility that it might have transacted -- or might someday consider transacting -- business with residents of other States who had no discernible connection to Alabama.

The jury substantially complied with that request. After a three-day trial, it returned a punitive damage verdict of $15 million, along with compensatory damages of $250,000, which were intended to remedy Ms. Johnson's $3,132 out-of-pocket loss -- the total amount of premiums she had paid over a three-year period -- plus the mental anguish that Ms. Johnson allegedly suffered upon learning that she had purchased an insurance policy that she did not need.

In its post-trial motions, Life of Georgia argued, among other things, that the $15 million punitive damage award violated the Due Process Clause. *See* App. at 159a-170a. The trial court remitted the punitive damage award to $12.5 million, basing that figure on the highest punitive damage award for fraud upheld by the Alabama Supreme Court. It otherwise left the verdict intact. *See* App. at 152a-154a.

Life of Georgia appealed to the Supreme Court of Alabama, contending that the $12.5 million remitted punitive damage award violated the Due Process Clause. App. at

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Tr. 520-21. Respondent's counsel apparently arrived at the requested figure of $15,083,250 by multiplying his request for Alabama, $1,160,250, times thirteen states in which Life of Georgia does business. Respondent's counsel had offered a preview of this argument in his opening statement, telling the jury that "we're going to ask you . . . to award a substantial verdict against Life Insurance Company of Georgia for punitive damages to punish them for this type of conduct and to prevent them from doing it to the other Daisey Johnsons of the State of Alabama and Florida and Mississippi, and people situated such as her." Tr. 14.

171a-181a. On November 17, 1995, that court issued its initial opinion. App. at 78a-146a. The court further reduced the punitive damage award to $5 million,[2] but otherwise rejected Life of Georgia's argument that the "award of punitive damages is grossly excessive and fundamentally unfair and therefore contravenes . . . the Due Process Clause of the Fourteenth Amendment." *Id.* at 88a. The court also announced a number of prospective changes to the Alabama punitive damage system to address Life of Georgia's federal due process argument that "under Alabama law, juries are provided too few standards" for imposing punitive damages, *id.*, and that the Alabama system is otherwise an arbitrary and capricious punishment regime that violates the Due Process Clause, *id.* at 102a-112a.

Justice Maddox dissented in part. He urged, *inter alia*, that the Alabama Supreme Court should have awaited this Court's decision in *BMW* before issuing its decision in this case, because *BMW* "contains some of the same legal questions that are present here, or similar ones." *App.* at 122a.

Life of Georgia filed an Application for Rehearing, contending that the remaining $5 million punitive damage award violated the Due Process Clause and arguing that, at the very least, it was entitled to the benefits of the supposed procedural reforms that the Alabama court had announced to remedy the Alabama system's defects. On April 26, 1996, the Alabama Supreme Court withdrew its November 17, 1995, opinion and released a new opinion. The court's April 26 opinion made a few changes to the portion of the court's earlier opinion concerning new Alabama procedures, but

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[2] The court provided no basis for concluding that $5 million represented an appropriate award other than to say "[i]t is the opinion of this Court that $5 million is not excessive for punishment and deterrence specific to Life of Georgia, considering all of the facts of this case." App. at 113a.

refused to apply those procedures to Life of Georgia or to disturb its prior federal constitutional rulings. *See* App. at 38a-41a.

Life of Georgia filed an Application for Stay in the Alabama Supreme Court pending the filing and disposition of a petition for writ of certiorari in this Court. On May 20, while that Application was pending, but after the time for filing a second rehearing petition had expired, this Court decided *BMW*. Life of Georgia filed a supplemental memorandum in support of a stay, bringing the *BMW* decision to the Alabama Supreme Court's attention.

On May 29, 1996, the Alabama Supreme Court denied Life of Georgia's stay application. App. at 182a. Justice Maddox dissented from the denial of a stay, declaring that "Life of Georgia raises several constitutional claims that obviously have merit." *Id.* at 183a. "In *BMW*, the Supreme Court found that this Court did not exercise its discretion reasonably and that the constitutional protection of due process of law was not satisfied," Justice Maddox concluded. "I think that the Court is guilty once again." *Id.* at 186a.

Life of Georgia then filed an Emergency Application for Stay with Justice Kennedy, who granted that Application on July 1, 1996. No. A-1034.

REASONS FOR GRANTING THE WRIT

A. The Court, At The Very Least, Should Grant Certiorari, Vacate The Judgment And Remand This Case For Further Consideration In Light Of *BMW*.

This case presents important and substantial federal due process questions that are directly and materially affected by this Court's decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The $5 million punishment here is the product of the same Alabama punitive damage system

that resulted in the $2 million award struck down in *BMW*. The Alabama Supreme Court issued its judgment sustaining the $5 million punitive damage award before the decision in *BMW* and therefore did not consider *BMW* in reaching its judgment. Under such circumstances, this Court frequently grants certiorari, vacates the judgment and remands for reconsideration in light of the Court's intervening decision. *See Lawrence v. Chater*, 116 S. Ct. 604, 607 (1996) (GVR orders are appropriate where this Court's intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."); *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964). Indeed, this Court already has granted certiorari, vacated the judgments below and remanded three similarly postured Alabama cases for further consideration in light of *BMW*.[3]

The Alabama Supreme Court's rulings concerning the unconstitutional excessiveness of the $5 million punitive damage award (Question 1) and the impermissible extraterritorial effect of that punishment (Question 2) clearly conflict with this Court's decision in *BMW*. For that reason alone, application of *BMW* is highly likely to change the result below and, at the very least, the Court should remand for reconsideration in light of *BMW*.

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[3] *See Union Sec. Life Ins. Co. v. Crocker*, No. 95-740, *g. v. r.*, 116 S. Ct. 1872 (1996); *American Pioneer Life Ins. Co. v. Williamson*, No. 95-1325, *g. v. r.*, 116 S. Ct. 1872 (1996); *Ford Motor Co. v. Sperau*, No. 95-771, *g. v. r.*, 116 S. Ct. 1843 (1996). Since *BMW*, the Court has denied certiorari in only one Alabama punitive damage case, *Schulte v. Smith*, No. 95-1477, *cert. denied*, 116 S. Ct. 1849 (1996), which involved a wrongful death claim and did not raise a due process excessiveness challenge to the punitive damage award.

1. Application of *BMW* will demonstrate that the $5 million punitive damage award is unconstitutionally excessive.

In *BMW*, this Court declared that when a particular punitive damage award is "grossly excessive" in relation to "the State's legitimate interests in punishment and deterrence," it enters "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 116 S. Ct. at 1595. In defining Alabama's legitimate interests in imposing punishment, the Court held that "a State may not impose sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *Id.* at 1597. Thus, the Court concluded that, in analyzing an Alabama punitive damage award for excessiveness under the Constitution, the award must be analyzed solely in light of conduct "that occurred in Alabama . . . with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." *Id.* at 1598. The *BMW* Court also articulated "[t]hree guideposts" for deciding whether a particular punitive damage award is so grossly excessive that it violates the Due Process Clause.

The result in this case is bound to change if the Court remands and the Alabama Supreme Court faithfully applies the principles articulated in *BMW*. As a threshold matter, there is no indication that the court below excluded extraterritorial factors from its calculus when making its due process excessiveness ruling. Thus, like *BMW*, this case raises issues concerning a State's power to impose punitive damages to "changing the tortfeasors' lawful conduct in other States." *BMW*, 116 S. Ct. at 1597. In fact, this case presents an even more extreme example of that unconstitutional practice than was presented in *BMW*. Whereas in *BMW* Dr. Gore had asked the jury to punish BMW for its *actual* sales beyond Alabama's borders, respondent in this case obtained a punishment based on the *mere possibility* that Life of Georgia had done, or might someday do, business with hundreds of

thousands of residents in twelve other jurisdictions. Yet, unlike in *BMW*, the court below did not purport to "eschew[] reliance on . . . out-of-state conduct" or "base[] its remitted award solely on conduct that occurred within Alabama." *Id.* at 1598; *see Part A.2., also infra.*

A proper analysis of Alabama's constitutionally legitimate interests in punishment pursuant to the three *BMW* guideposts can lead to no other conclusion on remand than that the $5 million award here violates due process. With respect to the "reprehensibility" factor, *BMW*, 116 S. Ct. at 1599, the Alabama Supreme Court's opinion contains much rhetoric. But there is no evidence in the record to "establish the high degree of culpability that warrants a substantial punitive damage award." *Id.* at 1601. "To find to the contrary, . . . is to make 'reprehensibility' a concept without constraining force." *Id.* at 1606 (Breyer, J., concurring).

This case -- like *BMW* and the remanded Alabama cases -- involves a financial tort, not conduct "evinc[ing] . . . indifference to or reckless disregard for the health and safety of others." *BMW*, 116 S. Ct. at 1599. The conduct at issue here was not part of some intentional corporate profit-making scheme. In fact, Life of Georgia had a clear and definite company policy that *forbade* the selling of Medicare Supplement policies to Medicaid recipients, that punished agents who violated the policy and that required refunds to individuals who purchased unnecessary Medicare Supplement policies. *E.g.*, Tr. 86; 88-91; 165; 191; 285; 298-300; 333; 374-75; 378-79; 414. Out of tens of thousands of Medicare Supplement policies sold by Life of Georgia, the evidence at trial was that only ten had ever been sold -- whether intentionally or unintentionally -- in contravention of this policy, Tr. 263-64, and that *only two* such instances, including the sale in this case, occurred in Alabama, *see* Tr. 60-62; 212. And there is no dispute that the Medicare Supplement policy is a legitimate product that provides

important insurance benefits to individuals who are not covered by Medicaid.

Nor did the courts below justify the award on the ground that either Life of Georgia or its agent maliciously sought to deceive Ms. Johnson. Rather, the best the courts below could do was to find that there was sufficient evidence to have permitted the jury to conclude that the agent "knew *or should have known*" that Ms. Johnson did not need to purchase a Medicare Supplement policy. App. at 7a (emphasis added); 148a.[4]

The degree of reprehensibility is also substantially lessened by the fact that Life of Georgia itself committed no punishable tort; it is being held vicariously liable for the conduct of its agent. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) (distinguishing between defendant that acted with malice and "a case of negligence, strict liability, or *respondeat superior*"). There was no proof that Life of Georgia had any notice that its agent in this case had ever sold an unnecessary Medicare Supplement policy before she sold a policy to respondent. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (affirming vicarious liability of insurance company for punitive damage award of $840,000 where, "[b]efore the frauds . . . were effectuated, Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents").

While respondent's theory was that Life of Georgia deserved to be held vicariously liable for punishment because

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[4] The evidence at trial was conflicting as to whether Ms. Johnson told the sales agent that she was a Medicaid recipient. The agent testified that she did not. Tr. 426; 451; 454. Respondent gave conflicting testimony. Tr. 226; 246. There was no dispute that the sales agent asked Ms. Johnson whether she was on Medicaid. Tr. 226; 454.

it did not adequately train its agents regarding eligibility for Medicare Supplement policies, *see* App. 7a-8a, the agent who sold the policy to respondent testified that she knew that she could not sell it to individuals on Medicaid. Tr. 432; 441. Both the agent and respondent testified that the agent asked respondent whether she was on Medicaid. Tr. 226; 454. The disputed issue of fact was whether respondent answered that question in the affirmative. *Compare* Tr. 246 *with* Tr. 454. At any rate, the undisputed evidence was that the application submitted to Life of Georgia clearly told the company that respondent was *not* on Medicaid. *See* Tr. 451. Thus, like *BMW*, this case "exhibits none of the circumstances ordinarily associated with egregiously improper conduct." *BMW*, 116 S. Ct. at 1601.

The *BMW* proportionality analysis, which evaluates the ratio between punitive damages "and actual harm," *BMW*, 116 S. Ct. at 1601, likewise shows why the $5 million punitive damage award in this case is grossly excessive. The punitive damage award is 1,600 times respondent's economic loss of $3,132 -- more than triple the "breathtaking," 500 to 1 ratio of punitive to economic damage in *BMW*. It also is 20 times respondent's "mental anguish" damages of $246,868, which Life of Georgia argued below are themselves grossly excessive and are subject to even less judicial supervision in Alabama than punitive damages.[5] No matter what the

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[5] Life of Georgia argued below that the jury's apparent verdict for $246,868 in compensatory damages for mental anguish was itself grossly excessive. Although the Supreme Court of Alabama rejected that contention, it provided no explanation whatsoever as to why $246,868 – which is nearly 5 times the $50,000 mental anguish award affirmed against Life of Georgia in the prior *Foster* case – was a rational approximation of the harm to Ms. Johnson, observing simply that "[t]here [is no] yardstick to measure the amount of recompense that should be awarded for . . . mental suffering." App. at 10a (quotation omitted).

yardstick, the $5 million punitive damage award far exceeds the 4:1 ratio in *Haslip*, which was "close to the line," 499 U.S. at 23-24, and the 10:1 ratio considered acceptable in *TXO*, 509 U.S. at 459-62.[6]

The result is the same if Life of Georgia's potential profits, as opposed to respondent's losses, are used as a measure of excessiveness. The $5 million award dwarfs the profits that Life of Georgia earned from selling Medicare Supplement policies. Indeed, Professor James Barth, an economics expert, testified in a deposition admitted at the post-trial hearing that "given Medicare Supplement premiums in Alabama, it would take approximately *three hundred years* to earn the profits needed to recoup the fifteen-million-dollar punitive damage verdict." Deposition Testimony of James Barth at 42. Thus, even the remitted award represents a *century's worth* of Alabama profits from the line of insurance involved in this case.

"Comparing the punitive damage award and the civil and criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 116 S. Ct. at 1603. This is especially true here. For example, the maximum fine in Alabama for making "a false or fraudulent statement or representation . . . relative to[] an application for insurance," Ala. Code § 27-12-23, is $1,000. The $5 million punitive damage award is 5,000 times that amount.

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[6] The 10:1 ratio in *TXO* took into account the fact that the actual damages in that case did not amount to all the harm that likely *could* have resulted from the defendant's conduct. *See BMW*, 116 S. Ct. at 1602 ("[I]n upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded."). There is no doubt here that the jury's compensatory damage award fully encompassed all conceivable harm that could have resulted from Life of Georgia's conduct.

In short, application of the *BMW* due process framework will compel the conclusion "that the grossly excessive award imposed in this case transcends the constitutional limit." *BMW*, 116 S. Ct. at 1604. A GVR order is appropriate to allow the Alabama Supreme Court to perform such an analysis in the first instance.

2. Application of *BMW* will demonstrate that the $5 million punitive damage award is based on improper extraterritorial factors and therefore violates due process.

The invitation by respondent's counsel during closing arguments that the jury punish Life of Georgia for its actual or potential sales of insurance policies in the twelve States surrounding Alabama -- and the jury's acceptance of that invitation -- not only is relevant to the excessiveness question, but resulted in an exercise of power that plainly exceeded the State of Alabama's constitutional authority under *BMW*. This Court in *BMW* declared that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *BMW*, 116 S. Ct. at 1597-98.

Here, respondent explicitly asked the jury to punish Life of Georgia to protect consumers from other States who had no connection to Alabama. And, with the exception of two actual Life of Georgia customers from Florida, respondents did not even attempt to prove that Life of Georgia had acted unlawfully in any of those other States.

To be sure, the *BMW* Court did "not consider whether one State may properly attempt to change a tortfeasors' *unlawful* conduct in another State." *BMW*, 116 S. Ct. at 1598 n.20. But even assuming that changing unlawful conduct was the intention of respondent's counsel when he asked the jury to

punish Life of Georgia for its potential future out-of-state conduct, the Court's reasoning in *BMW* strongly suggests that the Due Process Clause prohibits such extraterritorial punishment. The same "principles of state sovereignty and comity," *id.* at 1597, that the Court invoked in *BMW* preclude one State from deciding the means and quantum of the punishment appropriate for unlawful conduct that has or might occur in some other State. To allow Alabama to reach outside its borders and adjudicate liability and decide the punishment in such cases manifestly "would be infringing on the policy choices of other States." *Id.* at 1597.

Indeed, "the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting *its own consumers* and *its own economy*." *BMW*, 116 S. Ct. at 1597 (emphasis added). Moreover, "the States need not, and in fact do not," protect consumers "in a uniform manner." *Id.* at 1596. Although "[s]ome States rely on the judicial process to formulate and enforce" consumer protections "by applying principles of contract and tort law," others "enact[] various forms of legislation." *Id.* The Alabama Supreme Court explicitly relied on purportedly weak regulation of insurance companies *in that State* as a justification for inflicting substantial punitive damage awards against insurance companies generally and against Life of Georgia here. App. at 16a; *id.* at 37a ("The practice . . . would never have been permitted in this state if the activities of insurance agents were properly regulated."). But the jury was asked to punish Life of Georgia based on the company's business activities in twelve neighboring States, not just in Alabama. These other States may have chosen to establish systems that seek to protect consumers through legislative and regulatory mechanisms, rather than the punitive damage mechanism that is so highly favored in Alabama. The rationale of *BMW* precludes Alabama from

using its punitive damage system to force its neighboring States to accept Alabama's policy choices concerning how to regulate the insurance industry. *See BMW*, 116 S. Ct. at 1604 ("While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

Accordingly, this case presents issues concerning extraterritorial punishment that are similar to, and flow directly from, the Court's decision in *BMW*. A GVR is warranted to permit the Alabama Supreme Court to reconsider these important issues in light of *BMW*.

B. The Court Should Grant Plenary Review To Decide Whether The Due Process Clause Prohibits A Company From Being Punished Repetitively For The Same Conduct.

Although the petitioner in *BMW* raised the issue of "multiple punitive awards stemming from the same alleged misconduct," the Court did not address that issue because "the question of multiple awards [wa]s hypothetical, not real," in that case. *BMW*, 116 S. Ct. at 1617 n.4 (Ginsburg, J., dissenting). But that question *is* present in this case. Life of Georgia was clearly subjected to punishment for conduct that already had been punished. Indeed, Ms. Foster, a prior plaintiff who had already obtained a $1 million punitive damage award based on similar allegations, *see Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (Ala. 1994), was allowed to testify at the trial of this case. Tr. 60-67. The support was mutual, as Ms. Johnson had testified at the post-trial hearing in Ms. Foster's case in order to provide justification for the punitive award in that case. *See* App. at 50a n.15. Thus, Life of Georgia was punished for *both* alleged torts in *each* case.

Numerous courts have wrestled with the problem of multiple punitive damage awards. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (en banc) (holding that $25

million in punitive damages awarded against an asbestos manufacturer should be reduced to $1 million on the ground that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation"), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993); *id.* at 1400, 1405 (Weis, J., dissenting) (arguing that *any* additional punishment violated due process); *id.* at 1405 (Becker, J., dissenting) (same); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle.").[7] In fact, in a concurrence to the *BMW* decision overturned by this Court, Justice Houston of the Alabama Supreme Court recognized that duplicative punitive damage awards pose "serious problems" of a constitutional nature. *BMW of North*

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[7] *See also, e.g., In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), *cert. denied*, 479 U.S. 852 and 479 U.S. 915 (1986); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1061 (D.N.J.), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act . . . because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1107 (1993) (expressing concern that "'if juries in several lawsuits are able to assess punitive damages against the same defendant for the same transaction, there is a danger of overkill'") (quoting *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970)).

America, Inc. v. Gore, 646 So. 2d 619, 630 (1994) (Houston, J., concurring), *rev'd*, 116 S. Ct. 1589 (1996). Justice Maddox made the same point in this case in his partial dissent below. App. at 50a-53a.

This case squarely and unambiguously presents a situation in which a defendant was punished on the basis of conduct for which it had already been punished. The Court should grant the writ and set this case for plenary consideration in order to provide guidance to the lower courts on this important and recurring question.

C. The Court Should Grant Plenary Review To Decide Whether The Alabama Punitive Damage System Violates Due Process Because It Lacks Standards And Procedures To Provide Fair Notice Of The Conduct That Will Subject A Person To Punishment Or Of The Severity Of The Penalty That The State May Impose.

The Court should grant review and decide whether, as a matter of procedural due process, the Alabama punitive damage system contains constitutionally adequate standards to constrain the discretion of juries and courts to inflict punishment. While this Court in *Haslip*, 499 U.S. at 1, upheld the Alabama system against constitutional attack, events since *Haslip* demonstrate that the system is arbitrary, capricious and fundamentally unfair. As three Justices of the Court found in *BMW*, "[t]he standards the Alabama courts applied here are vague and open-ended to the point where they risk arbitrary results. . . . [T]he standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results." *BMW*, 116 S. Ct. at 1605 (Breyer, J.,

concurring).[8] Moreover, while "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty," *id.* at 1598, Alabama law provides fair notice of neither.

The results in this case and the prior *Foster* case graphically illustrate the flaws in the Alabama system. In *Foster*, the punishment was $1 million; in this case the jury imposed $15 million, the trial judge changed it to $12.5 million, and the Alabama Supreme Court changed the punishment to $5 million with no meaningful explanation for its selection of that number. That such widely varying amounts of punishment could be imposed for the same conduct demonstrates convincingly that no person could possibly predict in advance the size of the fine that the State of Alabama will inflict for this particular alleged misconduct. Alabama's "legal standards offer virtually no constraint" against arbitrary and extreme punishments. *BMW*, 116 S. Ct. at 1609 (Breyer, J., concurring).

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[8] In support of its federal due process claims, Life of Georgia's expert witness, Professor George Priest of Yale Law School, testified that "[t]he punitive damage verdicts in Alabama within the last year and for several years before that are extraordinary in their magnitude and in their frequency. There is nothing like this that has been recorded, I think, in the history of American jurisprudence." Tr. 574. Based upon officially reported appellate decisions introduced during the post-trial proceedings, *see, e.g.*, App. at 69a-74a (appendix to concurring and dissenting opinion of Maddox, J., consisting of charts depicting data submitted by Life of Georgia), Professor Priest also testified that "punitive damage verdicts by juries in Alabama, and even after their remittitur, . . . are severely out of line in comparison with verdicts in neighboring States as well as across the country." Tr. 574.

The constitutionality of procedures that routinely produce unconstitutional results, as do Alabama's, deserves further consideration by this Court. Whether the Alabama procedures are constitutionally adequate is especially important because -- since *Haslip* -- courts across the country have used the Alabama procedures as the standard for assessing the constitutionality of punitive damage systems in other states. *See, e.g., Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994) (per curiam) (concluding that the California punitive damage system is comparable to the Alabama system as approved by *Haslip*); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) (upholding constitutionality of Texas punitive damage system after comparison to Alabama system), *cert. denied*, 503 U.S. 1011 (1992).

The Court should grant the writ to revisit the question whether the Alabama *system* violates due process and to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either remanded for further consideration by the Alabama Supreme Court in light of *BMW* or set for plenary consideration.

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Respectfully submitted,

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